IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203.

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MOTION OF PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF.

MORDECAI ROSENFELD,
233 Broadway,
New York, New York. 10007

HAROLD E. KOHN,
AARON M. FINE,
ALLEN D. BLACK,
ARTHUR M. KAPLAN,
1700 Market Street,
Philadelphia, Pennsylvania. 19103

Attorneys for Petitioner.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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MOTION OF PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

Petitioner respectfully moves the Court for leave to file a Supplemental Brief pursuant to Rule 41, to bring to the Court's attention the intervening decision of the Court of Appeals for the Second Circuit in *Herbst v. International Telephone & Telegraph Corp.*, — F. 2d — (2d Cir. 1974),[1] bearing upon and explicitly clarifying the decision of the Second Circuit at bar. *Herbst* was decided on April 3, 1974, after argument herein.

Respectfully submitted,

MORDECAI ROSENFELD,
233 Broadway,
New York, New York. 10007

HAROLD E. KOHN,
AARON M. FINE,
ALLEN D. BLACK,
ARTHUR M. KAPLAN,
1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania. 19103
Attorneys for Petitioner.

1. A copy of the opinion of the Second Circuit in *Herbst* is printed in an Appendix hereto.

SUPPLEMENTAL BRIEF.

In *Eisen III*, the Court of Appeals for the Second Circuit permitted defendants to appeal as of right the District Court's order confirming the case as a class action. In Petitioner's briefs and arguments before this Court, Petitioner has argued that the Second Circuit's action invites interlocutory appeals in every class action, imposing a great new burden on the courts of appeals, and should therefore be reversed on the ground that the District Court's order was unappealable (Pet. Br., p. 23). Respondents denied that the *Eisen III* decision had any such broad effect, saying that the Second Circuit could not have intended so greatly to expand the number of orders subject to appeal, for "If [the Court] had held each class action determination appealable, it would have revolutionized, by a footnote, the law of the Second Circuit . . ." (Resp. Br., p. 94).

On April 3, 1974, the Second Circuit decided *Herbst v. International Telephone & Telegraph Corp.*, — F. 2d — (2d Cir. 1974), unequivocally supporting Petitioner's construction of *Eisen III*. In *Herbst*, a defendant was once again permitted to appeal a decision allowing a class action, under 28 U. S. C. § 1291 and the "collateral order" doctrine. The Court, in an opinion by Judge Lumbard (a member of the panel in *Eisen*) held that "[a]lthough other courts of appeals have held that orders authorizing class actions are not appealable," *Eisen III* permits the appeal of every such order in the Second Circuit. *Herbst* holds that, since

Eisen, every "order authorizing a class action is appealable under *Cohen*. . . ."

The other panel members in *Herbst* supported Judge Lumbard on the question of appealability, because they believed that the issue had been settled in *Eisen III*. Judge Mulligan, concurring, stated that, "*Although I have grave doubt that this order granting class action status is appealable,* I am not inclined to depart from *Eisen III* which is now on review in the Supreme Court." (emphasis added). Judge Danaher, "concurring (but *dubitante*)", added that, "What amounts to 'grave doubt' in Judge Mulligan's view is for me a persistent perturbation. I had supposed that 28 U. S. C. § 1291 would limit our review jurisdiction to 'final' decisions of the district court." Judge Danaher cited decisions of the Third, Fifth, Sixth, Seventh, and Ninth Circuits contrary to the expansive doctrine of appealability adopted in *Eisen III,* adding that:

> "The *Eisen* case was argued three weeks ago. Perhaps the Court will give consideration to what Judge Friendly has said in *Weight Watchers of Phila. v. Weight Watchers Int.* (2 Cir. 1972), 455 F. 2d 770, 773-774, particularly in light of his suggestion that *Cohen* 'be kept within narrow bounds, lest this exception swallow the salutary final judgment rule'."

It is now clear, if it was not before, that *Eisen III* invites, if not requires,[2] interlocutory appeal by all defendants against whom classes are certified.[3] In light of *Herbst,* it is evident that *Eisen III* (in the language of the Respondent's Brief, p. 94) "revolutionized, by a footnote, the law of

2. See *Herbst,* n. 10.

3. The "death knell" doctrine, by comparison, permits interlocutory appeal by only a small minority of putative class representatives—those who could not proceed absent a class action.

the Second Circuit'' on finality and interlocutory review, requiring reversal by this Court.

Respectfully submitted,

MORDECAI ROSENFELD,
233 Broadway,
New York, New York. 10007

HAROLD E. KOHN,
AARON M. FINE,
ALLEN D. BLACK,
ARTHUR M. KAPLAN,
1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania. 19103
Attorneys for Petitioner.

Appendix

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 314—September Term, 1973.

(Argued January 9, 1974 Decided April 3, 1974.)

Docket No. 73-2062

HILDA HERBST,

Plaintiff-Appellee,

v.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, ET AL.,

Defendants-Appellants.

Before: DANAHER,* LUMBARD and MULLIGAN, *Circuit Judges.*

Appeal from an order entered on May 11, 1973 in the District of Connecticut, M. Joseph Blumenfeld, *Chief Judge,* which held that plaintiff's action under the securities laws could be maintained as a class action. — F. Supp. —.

Affirmed.

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* Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

JOHN H. SCHAFER, Esq., Washington, D. C. (Charles Lister, Covington & Burling, Washington, D. C.; Joseph P. Cooney, Cooney, Scully and Dowling, Hartford, Connecticut, on the brief), *Attorneys for Appellants International Telephone and Telegraph Corporation, Raymond L. Brittenham, Francis J. Dunleavy, Russell F. Erickson, Harold S. Geneen, R. Newton Laughlin, Hart Perry and Ted B. Westfall.*

SAMUEL E. GATES, ROBERT L. KING, Debevoise, Plimpton, Lyons & Gates, New York, New York; John Q. Tilson, Wiggin & Dana, New Haven, Connecticut, on the brief, *Attorneys for Appellants Eugene R. Black, George R. Brown, Alvin E. Friedman, J. Patrick Lannan, John A. McCone and Warren Lee Pierson.*

JAMES A. WADE, Robinson, Robinson & Cole, Hartford, Connecticut; Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, on the brief, *Attorneys for Appellant Felix G. Rohatyn.*

SIDNEY B. SILVERMAN, Esq., New York, New York (Silverman & Harnes, New York, New York; James O'Connor Shea, New Haven, Connecticut, on the brief), *Attorneys for Appellee.*

LUMBARD, *Circuit Judge:*

This appeal from the District of Connecticut by the International Telephone and Telegraph Corporation (ITT)

and its directors in May 1970 [1] brings before us once again important questions concerning the administration of class actions. The first and more difficult issue is whether Chief Judge Blumenfeld's order of May 11, 1973, — F. Supp. —, which held that this case may be maintained as a class action is appealable at this time. The second issue is whether the judge was correct in so holding. We hold that the order is appealable and that the district court correctly decided that a class action is proper.

I.

Alleging that ITT in its controversial [2] acquisition of the Hartford Fire Insurance Company (Hartford) violated several provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 as well as Rules 10b-5 and 15c-2 of the Securities and Exchange Commission,

1. One director, Charles T. Ireland, Jr., died at about the time this action was commenced, and plaintiff has chosen not to serve his estate.

2. The Department of Justice tried unsuccessfully to gain a preliminary injunction against the Hartford Insurance-ITT merger. *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766 (D. Conn. 1969) (Timbers, *J.*). This case together with the suits against ITT's mergers with the Canteen Corporation and the Grinnel Corporation were eventually settled by consent decree. See *United States v. International Tel. & Tel. Corp.*, 349 F. Supp. 22 (D. Conn. 1972), *aff'd mem. sub nom. Nader v. United States*, 410 U. S. 919 (1973).

The complaint in this case appears to be based on a complaint filed on June 18, 1972 in the Southern District of New York by the Securities and Exchange Commission, which charged that ITT in the course of the Hartford merger sold unregistered securities by its arrangement (discussed below) with an Italian bank. Two days later ITT agreed to a permanent injunction. BNA Securities Regulation & Law Reporter, June 21, 1972, at A-6.

Subsequent to the argument in this case, the Internal Revenue Service revoked the revenue ruling that it gave in connection with the merger of ITT and the Hartford Fire Insurance Company. ITT says that it will seek judicial review of the revocation. N. Y. Times, March 7, 1974, at 1, col. 1.

Hilda Herbst initiated this action in September 1972. The complaint, which sought damages or rescission, alleged that Herbst had owned 100 shares [3] of Hartford common stock which she exchanged for 100 shares of ITT cumulative preferred stock, $2.25 convertible series N (with voting rights). In connection with this exchange, Herbst was given a prospectus dated May 26, 1970. Herbst admitted in a subsequent affidavit that on August 4, 1970, she sold the ITT preferred stock which she received in the exchange.

The prospectus stated that it was the opinion of counsel for ITT and Hartford that if ITT in its exchange offer acquired at least 80% of the outstanding Hartford common stock and if ITT acquired no Hartford common stock except in exchange for ITT voting stock, then no gain or loss to the Hartford shareholders would be recognized on their exchange for ITT preferred stock and their basis in the ITT stock would be their previous basis in the Hartford stock. ITT represented that it did not hold any Hartford common stock and that it would not acquire any Hartford common stock for cash or property other than ITT voting stock if that would affect the tax-free nature of the exchange. Herbst claims that these representations concerning the tax status of the exchange were false and misleading and that in fact ITT did own Hartford common stock which it had acquired by cash or property other than by its voting stock.

In April 1969 ITT entered into a merger agreement with Hartford. Several months prior to this agreement, ITT had purchased approximately 1.7 million shares or about 8% of the Hartford common stock. In connection with the proposed merger ITT sought from the Internal Revenue Service (IRS) a ruling that the merger would be a tax-free reorganization. The IRS held that the merger

3. The complaint stated that Herbst owned 200 shares. A later affidavit by Herbst stated that she only owned 100 shares.

would be a valid reorganization, if prior to the merger's consummation, ITT unconditionally disposed of the shares of Hartford common stock it had acquired.[4] On October 21, 1969, ITT received a supplemental IRS ruling, which stated that a proposed contract of sale between ITT and an Italian bank, Mediobanca BancadiCredito Finanziaro-S.p.A. (Mediobanca), would result in ITT's unconditional disposition of its Hartford shares.

The contract between ITT and Mediobanca was signed on November 3, 1969. At the same time Mediobanca and ITT's investment bankers, Lazard Freres & Co. (Lazard), signed an agreement, which Herbst alleges the IRS never saw before it made its ruling. Herbst claims that by reading the two contracts together it becomes apparent that ITT did not sell its Hartford stock to Mediobanca but that in fact Mediobanca was holding ITT's stock for a fee, and that, while Mediobanca held the stock, ITT retained the risks and benefits of ownership including the right to dividends and profits or losses upon sale.

The ITT-Hartford merger never became effective, for in December 1969, the Insurance Commissioner of Connecticut disapproved the plan. ITT then made arrangements to offer Hartford shareholders a voluntary exchange of their stock for ITT preferred stock. This exchange was conditional upon at least 95% of the Hartford shares being exchanged unless ITT chose to declare the exchange effective after 80% was exchanged. Apparently because the tax consequences of this plan were identical to those of the aborted merger, no effort was made to obtain a further IRS ruling. On May 23, 1970, following hearings, the Insurance Commissioner held that the proposed offer

4. Apparently, the Hartford stock, which evidently had been acquired for cash, had to be sold so that the Hartford stock ITT owned after the merger would have been exchanged "solely" for ITT voting stock. Internal Revenue Code of 1954, § 368(a)(1)(B).

was fair to Hartford shareholders and on May 26 the offer became effective. Subsequently, more than 99% of Hartford common stock shares were exchanged for ITT preferred.

Soon after this case was started Herbst moved for an order pursuant to Fed. R. Civ. P. 23(c)(1) holding that she could maintain her action as a representative of all Hartford shareholders who exchanged their stock for ITT preferred. Chief Judge Blumenfeld held that the suit could be maintained as a class action,[5] and from this order ITT appeals.

II.

In the last few years, we have passed upon the appealability of district court orders which held that a class action could not be maintained but that the individual claim of the plaintiff could proceed to trial. We have developed the "death knell" doctrine, which makes such an order "final" for purposes of appeal under 28 U. S. C. § 1291 if the individual claim is so small that plaintiff will not proceed upon it alone. We first announced this doctrine in *Eisen v. Carisle & Jacquelin*, 370 F. 2d 119 (3d Cir. 1966), *cert. denied*, 386 U. S. 1035 (1967) (Eisen I), where the district court dismissed the class action but allowed an individual claim of $70 to be continued. We said, "We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. . . . If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was

5. The court also ordered the parties to notify the members of the class, — F. Supp. —. The plaintiff will intially bear the cost of this notice. Evidently, no notice has been sent because of this appeal.

proper under the newly amended Rule 23." 370 F. 2d at 120.

We followed this doctrine in *Green v. Wolf Corp.*, 406 F. 2d 291 (2d Cir. 1968), *cert. denied*, 395 U. S. 977 (1969), where the individual claim was less than one thousand dollars. 406 F. 2d at 295 n. 6. But in two cases where the individual claims were very substantial, we held that the dismissal of the class action was not appealable. *City of New York v. International Pipe & Ceramics Corp.*, 410 F. 2d 295 (1969); *Caceres v. International Air Transport Association*, 422 F. 2d 141 (2d Cir. 1970). In *Korn v. Franchard Corp.* (Korn I), and *Milberg v. Western Pacific R. R.*, 443 F. 2d 1301 (2d Cir. 1971), we clarified our holdings by ruling in Korn that the dismissal of the class action was appealable when the individual claim was for $386 and in *Milberg* that the dismissal was not appealable when the individual claim was for $8500. Although the death knell doctrine has been criticized by courts that feel that no order dismissing only the class action claim should be appealable [6] and by commentators who feel all such orders should be appealable,[7] we have reiterated our adherence to the doctrine. Consequently, we dismissed an appeal because the individual claim of $7,482 was so substantial that the plaintiff would sue on that claim alone. *Shayne v. Madison Square Garden Corp.*, slip op. pp. 1565-74 (2d Cir., Jan. 22, 1974).

Here the defendant is appealing from an order holding that a class action can be maintained. Our most recent statement on whether such an order is appealable is found

6. *King v. Kansas City Southern Industries, Inc.*, 479 F. 2d 1259 (7th Cir. 1973); *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), *cert. denied*, 407 U. S. 925 (1972).

7. Note, Interlocutory Appeal from Orders Striking Class Action Allegations, 70 Colum. L. Rev. 1292 (1970); Note, Appealability of a Class Action Dismissal: The "Death Knell" doctrine, 39 U. Chi. L. Rev. 403 (1972).

in *Eisen v. Carlisle & Jacquelin*, 479 F. 2d 1005 (2d Cir.), *cert. granted*, 414 U. S. 908 (1973) (*Eisen III*).

Building on Judge Friendly's concurring opinion in *Korn I, supra*, 443 F. 2d at 1307, in which he suggested that the court might wish to consider a rule that would "afford equality of treatment as between plaintiffs and defendants," we said that the district court's order allowing a class action to be maintained is appealable. 479 F. 2d at 1007 n. 1.

In so saying we relied on Supreme Court cases that have given 28 U. S. C. §1291 a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949). See also *Gillespie v. United States Steel Corp.*, 379 U. S. 148 (1964); *Mercantile National Bank v. Langdeau*, 371 U. S. 555 (1963). We stated that an order authorizing a class action is appealable under *Cohen* because

> [it] clearly involves issues "fundamental to the further conduct of the case;" . . .
> [and] is also separable from the merits of the case; and [the] irreparable harm to a defendant in terms of time and money spent in defending a huge class action when an appellate court may years later decide such an action does not conform to the requirements of Rule 23, is evident.

Although other courts of appeals have held that orders authorizing class actions are not appealable,[8] we believe that *Eisen III* reached the correct result and we adhere to it. This circuit has probably been plagued by more class actions than any other circuit. As of June 30, 1973, there were 679 class actions pending in this circuit. Only

8. *Thill Securities Corp. v. New York Stock Exchange*, 469 F. 2d 14 (7th Cir. 1972); *Walsh v. City of Detroit*, 412 F. 2d 226 (6th Cir. 1969).

the Fifth Circuit had more and most of its class actions were civil rights suits which usually seek injunctive relief and are easier to manage. Administrative Office of the United States Courts, 1973 Annual Report of the Director, table 36, at II-44 to -45. The Southern District of New York alone had 523 class actions pending or almost 14% of those pending in all districts. *Id.* at II-42. We believe that immediate review of orders authorizing class actions will aid the district courts in disposing of these cases and promote the sound administration of justice.

First, as noted in *Eisen III* defendants in litigating class actions are likely to expend much money and time in defending such actions because of the enormous damages sought by the representatives of the class. Also the representation features of class actions mean that both parties have to expend much effort and money in notifying members of the class, determining who is in and who has opted out, calculating damages, and the like. Furthermore, the district courts, if cases go beyond initial proceedings, themselves must exercise more effort in supervising such actions than they would in individual cases. See *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S. D. N. Y. 1970), *aff'd*, 440 F. 2d 1079 (2d Cir.), *cert. denied*, 404 U. S. 871 (1971). Rule 23(e) requires them to approve any settlements and Rule 23(d) gives them the power and the responsibility of making orders determining the course of proceedings and protecting the members of the class. These gargantuan actions naturally take up infinitely more of the court's time than most other civil actions.

We believe that in the exercise of our supervisory powers over the administration of justice in the district courts it is desirable for us to review orders authorizing class actions before the parties and the district courts ex-

pend large amounts of time and money in managing them. Candor compels us to add that as appellate judges we would be reluctant to hold that a class action had been improper after the district court and the parties had expended much time and resources although we might have had serious doubts if we had reviewed the question at the inception of the action. Judicial efficiency requires that appellate review be made before the parties and district courts have spent considerable time, effort, and money, on such actions. Reviewing orders allowing class actions to proceed would determine issues "fundamental to the further conduct of the case," *United States v. General Motors Corp.*, 323 U. S. 373, 377 (1945), and would constitute a most effective way of exercising our supervisory powers.[9]

Second, defendants in class actions often face potential damages in the millions of dollars. If damages in this case came to $5 a share, the judgment would be for approximately $110 million. As noted in *Eisen III* and as Judge Friendly noted in his Carpentier Lectures, the result is that such class actions are usually settled, often with settlements which run into the millions of dollars and are small only when compared to the potential liability. *Eisen III, supra,* 479 F. 2d at 1019; H. Friendly, Federal Jurisdiction: A General View 119-20 (1973). Often these cases are settled even though the validity of plaintiff's claims are doubtful. See *West Virginia v. Chas. Pfizer & Co., supra,* 314 F. Supp. at 741-43; American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure 15-17 (1972). Settlements, of course, lessen the district court's problems in administering class actions,

9. We think that there ought to be a right to appeal rather than reliance on the discretion of the distrcit court to grant the certificate under 28 U. S. C. § 1292(b).

but also mean that no appellate court will ever review the question of whether a class action was proper unless immediate review is allowed. We, therefore, conclude that we have jurisdiction to hear this appeal.[10]

III.

We now turn to the question of whether the district court properly authorized a class action here. For the sake of argument, we shall treat plaintiff's case as being grounded on § 14(e) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(e), and Rule 10b-5, 17 C. F. R. § 240. 10b-5.[11] We do so only for the purpose of determining whether the district court properly authorized the maintenance of a class action and without prejudice to any other claims that plaintiff may plead.

Because some of ITT's arguments are based on what we perceive to be misunderstandings or misstatements of plaintiff's claim, it would be helpful at the outset to state our understanding of plaintiff's theory of the case. Herbst claims that ITT should have informed the holders of Hartford stock that there was a risk that the exchange might be a taxable event because of the fraud allegedly perpetrated by ITT in getting the favorable ruling from the IRS. (So far as we know, no shareholder has actually been taxed on the exchange.) Herbst claims that if the Hartford shareholders had known all the facts, a signifi-

10. We do not decide whether defendants in general must appeal at this stage of the proceedings or whether they can wait until after judgment is entered to appeal the class action determination. See H. Hart & H. Wechsler, The Federal Courts and the Federal System 1154 (P. Bator, D. Shapiro, P. Mishkin & H. Wechsler 2d ed. 1973).

11. The guiding principles of § 14(e) and Rule 10b-5 are the same. The difference is that § 14(e) applies only to tender offers. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F. 2d 341, 362 (2d Cir. 1973), *cert. denied*, 42 U. S. L. W. 3227 (U. S. Oct. 15, 1973).

cant number of them would not have exchanged their shares, at least at the established rate of one Hartford common share for one ITT preferred, series N. ITT would then have been compelled to give more in exchange than one share of ITT $2.25 preferred if it wished to complete its acquisition. Since ITT was offering an equal amount for each share of Hartford common, regardless of the individual shareholder's tax status, all shareholders would have benefited equally if ITT had been forced to offer more for the Hartford shares. In short, even the shareholder who did not care about the tax status of the exchange would have received more for his Hartford stock if enough shareholders did care and compelled ITT to raise its offer.

Disposing of ITT's first contentions, the class here is precise enough for class action purposes and Herbst's claims are typical of the class. The complaint defined the class as all holders of Hartford common stock who exchanged their shares for ITT preferred, which clearly identifies class members. ITT claims that Herbst's claims are not typical, because she sold her ITT preferred in the same year that she received it. Therefore, the argument runs, she cannot represent those who cared about whether the exchange was tax-free. ITT also contends that Herbst cannot represent the large, tax-exempt, institutional shareholders. As noted above, all those who exchanged their shares would have benefited from a higher price. Under Herbst's claims all shareholders, large and small, tax-exempt or not, would benefit equally and so her claim is typical. Furthermore, we do not perceive any conflict of interest between those who have retained their ITT shares and those who have since sold them. The personal interest of those who still hold ITT stock in gaining more from the exchange than they did far outweighs their concern that any award could damage ITT. *Herbst v. Able*, 47 F. R. D. 11, 15 (S. D. N. Y. 1969). Finally, we reject ITT's argu-

ment that the claim is not typical because no other class members have intervened on her side. See *Korn v. Franchard Corp.*, 456 F. 2d 1206, 1209 (2d Cir. 1972) (Korn II).[12]

Citing our decision in *List v. Fashion Park, Inc.*, 340 F. 2d 457 (2d Cir.), *cert. denied*, 382 U. S. 811 (1965), ITT next argues that common issues of fact and law do not predominate over questions affecting only individual members for purposes of Rule 23(b)(3) because reliance by each shareholder is a necessary prerequisite to his recovery. We do not agree. The district court noted that this issue was "problematic," but said that requiring proof of individual reliance was no bar to a class action since the common issues could be tried as a class action and individual damages and reliance could be tried separately if necessary. ITT asks us to reconsider, *Green v. Wolf Corp., supra*, 406 F. 2d at 301, upon which the district court relied, — F. Supp. at —, but reconsideration is unnecessary since subsequent decisions of the Supreme Court and of this court have decisively disposed of ITT's argument that individual reliance is a prerequisite to recovery. In particular, we believe that our decision in *Chris-Craft Industries, Inc. v. Piper Aircraft, Inc.*, 480 F. 2d 341 (2d Cir. 1973), *cert. denied*, 414 U. S. 910 (1973), governs here.

In *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970), minority shareholders brought a class action under § 14(a) of the 1934 Act, 15 U. S. C. § 78n(a), alleging that a proxy statement sent by the management of a company which urged shareholders to vote in favor of a merger contained a material omission. A significant number of minority

12. Since there were some 18,000 shareholders in Hartford, clearly there are too many to be joined in individual actions. There is a claim that Herbst cannot be expected to protect the class adequately, but this is based on claims of inconsistent interests of which we have already disposed. No other claim is made that Herbst and her counsel will not fairly and adequately protect the class.

shareholders had to approve the merger for it to gain the necessary votes of two thirds of the outstanding shares. Mr. Justice Harlan, speaking for the Court, said that the plaintiffs need not show that the merger would have not been approved if shareholders had known the fact omitted, but only that the omission was material:

> Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation itself, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions.

396 U. S. at 385.

In *Affiliated Ute Citizens v. United States*, 406 U. S. 128 (1972), the Court applied this rule in a 10b-5 case which involved the failure to disclose information that shares which the class had sold were selling for a higher price elsewhere. Mr. Justice Blackmun said:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.

406 U. S. at 153-54.

We followed the *Mills-Ute* test in *Chris-Craft Industries, Inc. v. Piper Aircraft Corp., supra,* a case involving a contest for control of Piper Aircraft between Chris-Craft and Bangor Punta Corporation. Chris-Craft claimed, and we found, that letters sent by the Piper family which managed Piper Aircraft to shareholders contained material misstatements and omissions and that a prospectus sent by Bangor Punta to Piper shareholders in connection with its exchange offer was misleading. The prospectus listed the book value of Bangor Punta's interest in a railroad at 18.4 million dollars but did not say that Bangor Punta had attempted to sell its interest and had received a serious bid of 5 million. We held that Bangor Punta was under an obligation to disclose this to Piper shareholders, 480 F. 2d at 367-69, and since the misstatements and omissions were material we presumed that without them the Piper shareholders would not have exchanged their shares in such numbers that Bangor Punta gained majority control of Piper Aircraft.

Chris-Craft clearly governs the result here. Like *Chris-Craft* the misstatements here occurred in the context of an exchange offer and the misstatements in each case are similar. In *Chris-Craft,* Bangor Punta's statement of the book value of the railroad interest was true as far as it went but it neglected to add that there was evidence that the interest was greatly overvalued on the books and that there was a likelihood that it might be sold at a substantial loss. Here, ITT's statement of the tax consequences of the exchange and its representation that it held no Hartford common stock were true as far as they went, but they allegedly did not add that ITT, while departing with nominal ownership of its Hartford stock, had retained the equitable ownership and that there was a possibility that the IRS might consider the exchange to be a taxable event.

It makes no difference that here the plaintiff was a shareholder in the acquired company while in *Chris-Craft* the plaintiff was the corporation defeated in the contest for control. We did say in *Chris-Craft* that "[t]he fact that [Christ-Craft] was not directly deceived is what makes application of the *Mills-Ute* test appropriate and essential." 480 F. 2d at 375. But we followed that sentence with

> [i]t would be unduly burdensome to require an offeror to prove actual reliance when, as here, there are numerous shareholders who undoubtedly possess a wide range of expertise and knowledge. It would be impractical to require [Chris-Craft] to prove that each individual Piper shareholder who failed to trade for [Chris-Craft's] stock, or who traded for [Bangor Punta's] stock, relied upon defendants' misrepresentations in doing so.

480 F. 2d at 375.

Here as in *Chris-Craft* and *Mills* the reliance of the individual shareholder is irrelevant. Here as in those cases plaintiff was damaged only if significant numbers of shareholders might have acted differently if they had known the truth. An individual shareholder here if he had known of the tax risk would have been forced to choose between accepting ITT's offer, which appears to have been very favorable,[13] and turning it down and becoming a minority shareholder in a company controlled by ITT. But if significant numbers of Hartford shareholders would have been reluctant to exchange at the given rate if they had known the truth, then ITT might have been forced to increase its offer to all Hartford shareholders, and all Hartford shareholders would have been damaged by its failure to disclose.

13. A share of ITT convertible preferred stock, series N, was to pay $2.25 a year in dividends. A share of Hartford common paid $1.40, $1.10, and $0.92 per share in 1969, 1968, and 1967, respectively.

As noted in *Mills* and *Chris-Craft*, it is extremely difficult to prove how shareholders in the aggregate would have reacted if they had known the whole truth. Therefore, it is appropriate for the district court to presume, as we did in *Chris-Craft*, that if there was a material misstatement, then Hartford shareholders would not have exchanged their shares at the rate offered if they had known the truth.[14] Since individual reliance is not a part of plaintiff's case, the district court did not err in holding that common issues of law and fact were predominant.

In conclusion, we believe that Chief Judge Blumenfeld did not abuse his discretion in authorizing the maintenance of a class action. Accordingly, we affirm the district court's order and remand for further proceedings.

DANAHER, *Senior Circuit Judge*, concurring (but *dubitante*):

Chief Judge Blumenfeld on May 11, 1973, issued his ruling that the instant case be maintained as a class action. The I. T. T. defendants on June 11, 1973, filed a notice of appeal as to which Herbst filed her motion to dismiss, now pending before us. Prescinding for a moment the question of appealability of an interlocutory order granting class action status, I have no problem with Part III of Judge Lumbard's opinion. That the record presents a class action situation would seem beyond question. Judge Lumbard's

14. Judge Mansfield in his separate opinion in *Chris-Craft* objected to the majority's statement that there would be "presumption of reasonable reliance" if the misstatement was material. He argued that neither *Mills* or *Ute* used this phrase and said that it raised the issue of whether defendants could rebut the presumption. He felt that the materiality of the misrepresentation established reliance as a matter of law. 480 F. 2d at 399-400. Neither the majority in *Chris-Craft* nor the Supreme Court in *Mills* or *Ute* remanded those cases for the purpose of allowing defendants to raise such a defense.

opinion on this point has been joined by Judge Mulligan, and I happily concur.[1]

Whether we have jurisdiction to review the interlocutory order presents a wholly different problem. I note that Judge Mulligan says "Although I have grave doubt that this order *granting* class action status is appealable, I am not inclined to depart from *Eisen*, III, which is now on appeal in the Supreme Court." (Italics mine).

What amounts to "grave doubt" in Judge Mulligan's view is for me a persistent perturbation. I had supposed that 28 U. S. C. §1291 would limit our review jurisdiction to "final" decisions of the district court. Had a visiting judge from the Seventh Circuit participated in this case, he would have had in mind *Thill Securities Corp. v. New York Stock Exchange*, 469 F. 2d 14, 15-16 (7 Cir. 1972). Had that visiting judge come from the Fifth Circuit, he would have looked at the impact of §1291 respecting a class action ruling as interlocutory, even after consideration of the Second Circuit cases cited in *Songy v. Coastal Chemical Corporation*, 469 F. 2d 709, 710 (5 Cir. 1972). A Ninth Circuit visiting judge would not have been oblivious respecting the Second Circuit position in light of the cases cited in footnote 3, *Falk v. Dempsey-Tegeler & Co., Inc.*, 472 F. 2d 142, and text at 144. Yet other cases are pertinent, such as *Walsh v. City of Detroit*, 412 F. 2d 226 (6 Cir. 1969) and *Hackett v. General Host Corp.*, 455 F. 2d 618 (3 Cir. 1972), *cert. denied*, 407 U. S. 925 (1972). The Seventh Circuit, only a few months ago in *King v. Kansas City Southern Industries, Inc.*, 479 F. 2d 1259 at 1260 expressly declined to adopt and accordingly rejected the "death knell" theory originally announced in *Eisen*, I.

Our visiting judge, striving earnestly to accommodate his imported thinking to Second Circuit situations, would

1. I attach by way of Appendix Judge Blumenfield's unreported memorandum ruling on the Herbst motion for class action designation. [Appended decision omitted herein].

surely have been impressed by comments in *Caceres v. International Air Transport Association*, 422 F. 2d 141 (2 Cir. 1970). This court at 143 noted that the weight of authority prior to the 1966 amendments to Rule 23 had held that an order striking class suit allegations was not appealable under Section 1291. Again, while granting that Rule 23 amendments were indeed far-reaching, the opinion said at 144, "We do not think they were intended to change that doctrine".[2]

Judge Lumbard, *supra* at p. 2626 writes:

> We have developed the "death knell" doctrine, which makes such an order "final" for purposes of appeal under 28 U. S. C. § 1291. . . .

Quite apart from the views expressed in other circuits, Judge Feinberg observes in *Shayne v. Madison Square Garden Corporation*, — F. 2d — (2 Cir. 1974) (Sl. op., 1570):

> Conversely there have been rumblings of disapproval in our own court because the doctrine grants a right to appeal to some plaintiffs, but not to any defendants. E.g., *Eisen*, III, 479 F. 2d 1005, 1007, n. 1 . . . and the concurring opinion of then Chief Judge Friendly in *Korn, supra*, 443 F. 2d at 1307.[3]

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2. It was suggested further that for review purposes reliance might be had on 28 U. S. C. § 1292(b).

3. *Eisen, III*, 479 F. 2d at 1020, n. 28 records Judge Friendly as having said in 1972 that something "seems to have gone radically wrong with a well-intentioned effort". *Cf.* Judge Friendly's earlier comments, concurring, in *Korn v. Franchard Corp.*, 443 F. 2d 1301, 1307 (2 Cir. 1971). Perhaps what that great jurist *really* there meant was: If—if interlocutory orders denying class action status are to be appealable, conversely a defendant should be allowed to appeal from an interlocutory order *granting* such status.

I take it that footnote 1 in *Eisen*, III, *supra*, constitutes—not a holding—but a commentary on the background for the doctrine "de-

And what will we now say of *Eisen*, III? In 479 F. 2d at 1005, 1016, it was noted that

> From the beginning it has been Judge (then Chief Judge) Lumbard's view that as a class action the case is unmanageable and that it should be dismissed as a class action.

Without our actually quoting the various "holdings" of *Eisen*, III, we need note only the Court's conclusion, *id.*, at 1020:

> For the reasons stated in this opinion the findings and conclusions following the minihearing are vacated and set aside, the various rulings of the District Court sustaining the prosecution of the case as a class action are reversed and, as a class action, the case is dismissed, without prejudice to the continuance of so much of the claim asserted in the complaint as refers to Eisen's alleged individual rights against the defendants.

Thus the death knell was sounded for *Eisen* unless the Supreme Court shall see something that we do not see.[4]

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3. (Cont'd.)
veloped" in *Eisen*, I. Perhaps footnote 1 is really an answer of sorts to the question posed by Judged Timbers, "How Did We Get Here" in *International Business Machines Corporation v. United States*, 480 F. 2d 293, 303 (2 Cir. 1973). *Shayne*, text *supra*, interprets the "doctrine" as granting "a right to appeal to some plaintiffs, *but not to any defendants*". (Emphasis added). I assume that it is clear enough that no "death knell" confronts any plaintiff where a class action designation has been accorded.

4. The *Eisen* case was argued three weeks ago. Perhaps the Court will give consideration to what Judge Friendly has said in *Weight Watchers of Phila. v. Weight Watchers Int.* (2 Cir. 1972), 455 F. 2d 770, 773-774, particularly in light of his suggestion that *Cohen* "be kept within narrow bounds, lest this exception swallow the salutary final judgment rule".

After all these years, after the expenditure of time and effort, especially by Judge Tyler, *Eisen* is back where he started. For him the bell tolled.

Some judges are by no means clear as to the law of the Second Circuit respecting jurisdiction to review Judge Blumenfeld's interlocutory order designating the instant case as a class action. The finality contemplated in Section 1291, some might say, is no less definite than the jurisdictional prerequisites, 28 U. S. C. § 1331, where class action status is sought in a diversity action. *Snyder v. Harris,* 394 U. S. 332 (1969), insisted that the required jurisdictional amounts be made to appear despite the powerful dissent by Mr. Justice Fortas at 353. *Zahn v. International Paper Co.,* 42 U. S. L. W. 4087 (1973), adhered to *Snyder* in affirming this court's opinion, 469 F. 2d 1033 (1973).

Perhaps it is in order to take a fresh look at the problem under consideration, especially in view of the "rumblings of disapproval" as reported in *Shayne, supra.* Great temerity would be required to suggest a rehearing *en banc,* particularly after a visiting senior judge has read the views of able colleagues expressed in *Zahn v. International Paper Company, supra,* 469 F. 2d at 1040 and 1041. Even so, this writer for more than thirty years [5] has viewed with great favor the resolution of intra-circuit conflicting views by resort to *en banc* consideration. Although there seems to be lacking a clearly definitive ruling of Second Circuit law to govern our problem, this writer feels constrained to submerge his own view as to the non-appealability of

5. See *Western Pacific Railroad* case, 345 U. S. 247, 252, text and note 5 (1953), and the Court's discussion, 259-260. Of course, *en banc* orders do not always please everyone. See, *e.g., Williams v. Adams* where this writer spoke for the court, Hays, *J.*, concurring, 436 F. 2d 30 (1970), reversed by *en banc* vote without further argument, 441 F. 2d 394 (1971), in turn reversed, *Adams v. Williams,* 407 U. S. 143 (1972).

Judge Blumenfeld's decision. Accordingly, despite the perturbation earlier expressed, I will defer to my colleagues and join them in their disposition of the issue under consideration.

MULLIGAN, *Circuit Judge* (concurring):

I fully agree with Judge Lumbard that the district court correctly determined that a class action here was proper. Although I have grave doubt that this order granting class action status is appealable, I am not inclined to depart from *Eisen* III which is now on review in the Supreme Court.